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IN THE

Supreme Court of the United States

October Term, 1961.

No. 1841.

THOMAS BATTLES,

Petitioner,

v.

ARTHUR J. GOLDBERG, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Supreme Court of the United States.

OCTOBER TERM, 1961.

No.

THOMAS BATTLES,

Petitioner

v.

ARTHUR J. GOLDBERG, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Thomas Battles, your Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on March 19, 1962.

OPINION BELOW.

The opinion of the Court below (Appendix A, *infra*, p. 33) has not yet been reported.

JURISDICTION.

The judgment of the Court below (Appendix B, *infra*, p. 34) was entered on March 19, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Can the Secretary of Labor validly delegate to the Department of Justice his duty of investigating under § 601(a) of the Labor-Management Reporting and Disclosure Act of 1959; if so, has he in fact done so?

2. Can the Secretary of Labor validly delegate to the Commissioner of the Bureau of Labor-Management Reports his right to sign and issue subpoenas under § 601(b) of the Labor-Management Reporting and Disclosure Act of 1959; if so, has he in fact done so?

3. Can a labor relations consultant, who has no duties under the Labor-Management Reporting and Disclosure Act of 1959, be required to appear and to testify in a proceeding entitled "investigation by the Department of Justice involving a determination whether any person has violated or is about to violate" that Act, without any showing of "probable cause" or "reasonable grounds to believe" the testimony is necessary?

4. Does the Labor-Management Reporting and Disclosure Act, which incorporates the compulsory testimony provisions of the Federal Trade Commission Act, violate the federal Constitution in failing to provide adequate immunity as required by the Fifth Amendment?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.

United States Constitution, Fifth Amendment:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .

Labor-Management Reporting and Disclosure Act of 1959, [Landrum-Griffin Act]:

§ 601. Investigations by Secretary; applicability of other laws

(a) The Secretary shall have power when he believes it necessary in order to determine whether any person has violated or is about to violate any provision of this chapter (except subchapter II of this chapter)[1] to make an investigation and in connection therewith he may enter such places and inspect such records and accounts and question such persons as he may deem necessary to enable him to determine the facts relative thereto. The Secretary may report to interested persons or officials concerning the facts required to be shown in any report required by this chapter and concerning the reasons for failure or refusal to file such report or any other matter which he deems to be appropriate as a result of such an investigation.

(b) For the purpose of any investigation provided for in this chapter, the provisions of sections 49 and 50 of Title 15 (relating to the attendance of witnesses and the production of books, papers, and documents), are made applicable to the jurisdiction, powers, and duties of the Secretary or any officers designated by him.

[29 U. S. C. § 521.]

§ 607. Cooperation with other agencies and departments

In order to avoid unnecessary expense and duplication of functions among Government agencies, the Secretary may make such arrangements or agreements for cooperation or mutual assistance in the performance of his functions under this chapter and the func-

1. As printed in the Statutes at Large, this portion reads: ". . . any provision of this act (except Title I or amendments made by this Act to other statutes)." 73 Stat. 539.

tions of any such agency as he may find to be practicable and consistent with law. The Secretary may utilize the facilities or services of any department, agency, or establishment of the United States or of any State or political subdivision of a State, including the services of any of its employees, with the lawful consent of such department, agency, or establishment; and each department, agency, or establishment of the United States is authorized and directed to cooperate with the Secretary and, to the extent permitted by law, to provide such information and facilities as he may request for his assistance in the performance of his functions under this chapter. The Attorney General or his representative shall receive from the Secretary for appropriate action such evidence developed in the performance of his functions under this chapter as may be found to warrant consideration for criminal prosecution under the provisions of this chapter or other federal law.

[29 U. S. C. § 527.]

Federal Trade Commission Act:

§ 9. Documentary evidence: depositions; witnesses

For the purposes of sections 41-46 and 47-58 of this title the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such an order of the court may be punished by such court as a contempt thereof.

* * *

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided*, that no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

[15 U. S. C. §49.]

§ 10. Offenses and penalties

Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

* * *

[15 U. S. C. § 50.]

STATEMENT OF THE CASE.

Petitioner Thomas Battles seeks review of the judgment of the Court of Appeals for the Third Circuit affirming the order of the District Judge compelling Petitioner to appear and to testify before an attorney for the Department of Justice.

Petitioner Thomas Battles was served with a printed form entitled "Subpena," bearing the printed seal of the Department of Labor, and issued over the signature of the Acting Commissioner, Bureau of Labor-Management Reports (7a-8a).* That document appears to be a subpoena of the type normally used by the Wage and Hour Division of the Department of Labor, which was specially modified for the instant situation. That subpoena directed Petitioner to appear before Thomas F. McBride of the Department of Justice, at the United States Courthouse in Philadelphia, to testify "In the Matter of an investigation by the Department of Justice involving a determination whether any person has violated or is about to violate any provision of the

* References are to the Appellant's Appendix filed in the Court of Appeals, nine copies of which have been filed in this Court.

Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. 401 et seq., except Title I or amendments made by the Act to other Statutes."[2]

Instead of simply ignoring the subpoena or refusing without reason to testify, the Petitioner appeared with counsel before Mr. McBride and, through counsel, submitted a statement setting forth his reasons for believing the subpoena and the proceedings to be a complete nullity (9a-31a). Petitioner was subsequently served with a Petition (2a) and Order to Show Cause (33a), and a Memorandum in Support of the Petition (34a). Petitioner filed an Answer (49a) and Memorandum in Opposition (51a). After hearing, Honorable Thomas J. Clary, United States District Judge, filed an Opinion (69a-78a) sustaining the validity of the subpoena and signed an Order compelling Petitioner to appear and to testify (79a). Petitioner moved the Court to stay enforcement of the Order (80a), and Honorable Harold K. Wood, United States District Judge, ordered the proceedings stayed pending appeal (81a). The Court of Appeals affirmed on the opinion of the District Court (Appendix A, *infra*, p. 33).

Petitioner is a labor relations consultant employed by several large bottling firms in the Philadelphia area. Accordingly, he has no obligation to file any reports under the Labor-Management Reporting and Disclosure Act of 1959. Mr. McBride stated during the proceedings before him that in 1960 there had been a $100-a-plate dinner held by the Teamsters League of Philadelphia and Vicinity and that Petitioner had been seen at that dinner together with an official of one of the largest bottling firms in Philadelphia. Secretary-Treasurer of that League was Louis Lanni, who was also Secretary-Treasurer of Local 830 of the Teamsters Union (9a-10a, 21a). Mr. McBride, in defining the scope of his intended investigation, stated:

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2. Although the act as it appears in the United States Code does not contain the last phrase, it is clear that the subpoena was drawn under Statutes at Large version, and does not seek to inquire into violations of the Taft-Hartley Act as amended by Landrum-Griffin.

"What I want to know from Mr. Battles is, did he purchase these tickets from Louis Lanni? I want to know the details of it if he did purchase them. I want to go into collateral matters in connection with dealing with Mr. Lanni or any other union official." (21a).

Petitioner challenged the right of the Department of Justice to conduct this investigation, the validity of the subpoena, and the right to compel Petitioner, who has no duties under this Act, to testify in this proceeding. Petitioner further asserted that these proceedings deprived him of rights guaranteed by the federal Constitution.

REASONS FOR GRANTING THE WRIT

This case not only raises a serious question concerning the rights of an individual under federal labor law and the constitutionality of this law as applied to him, but it also raises important questions as to the interpretation of the Labor-Management Reporting and Disclosure Act of 1959 (the Landrum-Griffin Act) relating to the authority of the Secretary of Labor to delegate his investigative and subpoena powers under that Act. These questions have not previously been raised in this Court and have far-reaching impact on the enforcement of the federal labor laws throughout the nation. This Court should accordingly review the decision of the Court below.

1. The Secretary of Labor Did Not Conduct This Investigation, and Cannot and Has Not Delegated His Duty of Investigating Under This Act.

A. The Secretary of Labor Did Not Conduct This Investigation.

The Respondent (who was petitioner in the District Court) invokes as authority for the investigation which took place here, § 601(b) of the Labor-Management Report-

ing and Disclosure Act of 1959 (hereinafter referred to as the Landrum-Griffin Act) [29 U. S. C. § 521(b)], which incorporated sections 9 and 10 of the Federal Trade Commission Act, 15 U. S. C. §§ 49, 50. However, under § 601(b) a subpoena can be issued only in support of an investigation provided for in that Act; it cannot be issued independently of an investigation.

In the case at bar the subpoena shows on its face that there is no investigation by the Department of Labor—the subpoena itself states that Appellant was called to testify "In the Matter of an investigation by the Department of Justice" (7a).

Thus, it is clear that this proceeding was not brought within the terms of the Act.

B. The Secretary of Labor Cannot Delegate His Investigatory Function Under the Act.

The right of the Secretary of Labor to investigate is set out in § 601(a) of the Landrum-Griffin Act, 29 U. S. C. § 521(a). That section does not in terms authorize the Secretary to delegate his investigatory function. Nor does it specifically authorize the Secretary to designate any officer to investigate on his behalf. In fact, the term "Secretary" is defined in § 3(p) of the Act, 29 U. S. C. § 402(p), to mean "Secretary of Labor"; it does not define the term to include "Secretary or his designee." Thus, § 601(a) taken alone clearly specifies that only the Secretary himself can investigate. Section 601(b), incorporating the provisions of the FTC Act, makes them applicable to the "jurisdiction, powers, and duties of the Secretary or any officers designated by him." However, § 601(b) does not create any investigatory powers—it merely sets out the procedure to be utilized "for the purpose of any investigation provided for in this chapter . . ."

Thus, it appears that the use by Congress in § 601(b) of the phrase "or any officers designated by him" was un-

necessary and unauthorized by the rest of the Act, since the other relevant provisions of the Act do not permit a delegation of the duty of investigating. In the case at bar, the Respondent argued and the District Court concluded that Congress could not have intended this interpretation, since Congress could not have intended the Secretary to conduct all investigations personally. The District Court concluded that the sections read together permit the Secretary to designate officers to conduct investigations that he himself is authorized to conduct, and that § 601(b) arms these officers with the power to issue subpoenas (72a).

The principle is too clear for extended citation that the court cannot correct a legislative oversight in the absence of an ambiguity. No such ambiguity exists here. The courts cannot create one by construction, even if they believe Congress meant something other than what it said. This Court has noted that even if Congress underestimated the burden imposed upon an administrative official, the court cannot restore by judicial construction a power to delegate withheld by Congress. *Cudahy Packing Company v. Holland*, 315 U. S. 357, 363 (1942); also see *NLRB v. Pesante*, 119 F. Supp. 444, 454 (S. D. Calif. 1954).

In *Cudahy Packing Company v. Holland, supra*, this Court held that the Fair Labor Standards Act did not authorize the Administrator of the Wage and Hour Division to delegate his statutory authority to sign and issue subpoenas. As in the Act *sub judice*, the Fair Labor Standards Act did not define the Administrator's power to issue subpoenas or specifically authorize him to delegate it to others. That Act, like the Landrum-Griffin Act, made applicable the subpoena provisions of the FTC Act. The FLSA also specifically permitted the Administrator's "duly authorized representative" to exercise "any or all of his powers in any place." Even though this Court concluded that the Administrator could investigate through designated representatives, the Court distinguished between the subpoena power and the power to make investigations, which was expressly made delegable in that Act. This

Court noted that even though Congress had underestimated the burden placed upon the Administrator, the Court could not grant by construction an authority to delegate which had not been specifically granted by Congress. This reasoning is equally applicable to the failure of Congress to provide for delegation of investigative functions in the Landrum-Griffin Act.

When Congress wanted to permit delegation of functions, it clearly knew how to provide for such delegation; see, *e.g.*, the Taft-Hartley Act, 29 U. S. C. § 461, and the Fair Labor Standards Act, 29 U. S. C. § 211(a), and the Child Labor provisions, 29 U. S. C. § 212(b). Here, however, there was no specific authorization to delegate.

Nor does the Landrum-Griffin Act contain a broad rule-making provision which by itself might justify delegation of functions, including the power to investigate. See *Fleming v. Mohawk Wrecking and Lumber Co.*, 331 U. S. 111, 121 (1947); *cf. NLRB v. Pesante*, *supra*, 119 F. Supp. at 454-455. Section 607 of the Act (29 U. S. C. § 527), which permits the Secretary to make arrangements for "cooperation or mutual assistance in the performance of his functions under this chapter [the Landrum-Griffin Act] and the function of any such agency as he may find to be practicable and consistent with law," does not compel a different conclusion. That section does not permit the Secretary to *delegate* any of his functions or responsibilities; it merely permits him to utilize the assistance of other agencies in performing *his* functions. Any cooperation or mutual assistance must be "consistent with law"; thus, a delegation not authorized by some other section of the Act would not be "consistent with law." *Cf. Lowell Sun Co. v. Fleming*, 120 F. 2d 213 (1st Cir. 1941), *affirmed*, 315 U. S. 784 (1942), where the statute involved expressly gave the power to delegate the investigative function, but was held not to authorize the delegation of the power to issue subpoenas.

Accordingly, the Landrum-Griffin Act does not authorize the Secretary of Labor to delegate his investigative power.

C. The Secretary of Labor Cannot Delegate His Investigatory Function to Another Agency, Particularly Not the Department of Justice.

Even if the Landrum-Griffin Act were interpreted to permit the Secretary of Labor to delegate his investigatory power, there is nothing in the Act which can be interpreted as authorizing him to delegate that power outside his department. The Secretary of Labor, as the head of the Department of Labor, is directly responsible for all matters affecting labor relations. The duty of investigating any violation or anticipated violation of the Landrum-Griffin Act is peculiarly within his ambit. Under § 601(a), it is the Secretary's responsibility to report to interested persons or officials concerning facts disclosed by such investigation or any other matter which he deems appropriate as a result of such investigation.

Section 607 does not authorize the Secretary to shun that responsibility. All it does is permit him to use facilities of other agencies to *assist* him in the performance of his functions.

It would be contrary to the spirit of the Act to permit the Secretary by administrative fiat to pass his responsibility to the Department of Justice. The function of the Secretary under the Landrum-Griffin Act is to investigate. The Department of Justice, on the other hand, is an accusatory or prosecutive agency. While the Department of Justice may investigate in connection with its prosecutive functioning, it may not compel persons to submit reports, and it may not issue and enforce subpoenas—only a court may do so, as, for example, in connection with a Grand Jury investigation. This Court has recently noted the distinction between investigative bodies and prosecutive ones. See *Hannah v. Larche*, 363 U. S. 420 (1960), especially at pp. 441, 442, 488 (concurring opinion), 498 et seq. (dissenting opinion). In that case, the Court sustained Rules of Procedure adopted by the Commission on Civil Rights, an agency of the Executive Branch, which did not grant

constitutional rights guaranteed in judicial proceedings. This Court noted:

> "Its function is purely investigative and fact finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action." 363 U. S. at 441.

The opinion went on to note that adjudicative or prosecutive functions would invoke different standards and would make it necessary that "the full panoply of judicial procedures be used."

This distinction makes it clear that the Act did not and could not constitutionally authorize the Secretary to delegate to the Department of Justice, an accusatory agency, his investigative functions. It would violate the safeguards inherent in the Constitution to permit the Secretary of Labor to clothe the Department of Justice with powers never intended by Congress to be reposed in the Department of Justice, and never specifically granted to it by Congress. To grant to an agency charged with the duty of prosecuting violations of law the right to investigate anticipated violations, to compel the filing of reports, to compel attendance in private session[3] by means of subpoena

3. The proceedings before Mr. McBride were held in the United States Attorney's offices, with no one present besides Mr. McBride, Petitioner's counsel, and the court stenographer. At the close of the proceedings, counsel for Petitioner, in the presence of Mr. McBride, requested the Court Reporter who had taken the proceedings, to furnish a copy of the notes of testimony relating to Petitioner's appearance, at the cost of Petitioner. Mr. McBride announced that counsel was not entitled to receive such notes. When counsel persisted in the request, Mr. McBride promised to consult with his superiors in Washington, and a day or so later advised counsel that he would be permitted to order a copy of the notes. This demonstrates that at least the Department of Justice considers the proceedings to be secret.

issued without judicial supervision, would create an inquisitorial board never envisioned under this Constitution and would be contrary to all principles of Anglo-American jurisprudence. Such an inquisitorial board would be far worse than the "one-man legislative committee" which was rejected by this Court in *Sweezy v. New Hampshire*, 354 U. S. 234 (1957). One Justice, in a case dealing with the right of administrative officials to use subpoenas, underscored the danger of permitting prosecutive officials to investigate, armed with the subpoena power:

> "It would have been surprising had Congress attempted to authorize the Nation's chief prosecuting officer and his subordinates to compel a citizen to appear in Government private offices to answer questions in secret about that citizen's conduct, associations, and beliefs. Some countries give such powers to their officials. It is to be hoped that this country never will." *United States v. Minker*, 350 U. S. 179, 195-196 (1956) (Black, concurring).

Section 607 of the Act sustains the conclusion that Congress never intended the Secretary to delegate to the Department of Justice his investigatory power. That section expressly provides that the "Attorney General or his representative shall receive *from the Secretary* for appropriate action such evidence developed in the performance *of his functions* under this chapter [the Landrum-Griffin Act] as may be found to warrant consideration for criminal prosecution. . . ." 29 U. S. C. § 527 (emphasis supplied). This section clearly indicates that it is the Secretary's function to investigate and discover evidence, not the Attorney General's. This clearly shows the legislative intention to separate the investigative and prosecutive functions.

The District Court in the case at bar concluded that § 607 is not so limited, and authorizes broad interdepartmental cooperation. It noted the expertise of the Department of Justice in investigating (74a). Petitioner does

not question the right of the Secretary to utilize the assistance of any department, including the Department of Justice. However, the Secretary cannot abdicate the responsibility concomitant with the authorization given him in the statute. It is his sole responsibility to investigate—even if he uses other agencies to assist him in that investigation. The right to cooperate does not necessarily imply the right to delegate.

Section 11 of the Fair Labor Standards Act (29 U. S. C. § 211), cited by the District Court as an example of restriction of interagency delegation relating to investigations and inspections (74a), was not actually a limitation, but an authorization. Section 211 of that Act authorized the Administrator to utilize the bureaus and divisions of the Department of Labor for all investigations and inspections necessary under that section, except as provided in § 212 and subsection 211(b). Subsection 211(b) authorized the Administrator and Secretary of Labor to utilize the services of state and local agencies and their employees. Section 212 restricted investigations and inspections respecting the employment of minors to the Secretary of Labor or any of his authorized representatives. Thus, Congress knew how to provide for interagency cooperation, as well as specific delegation of functions.

It can thus be seen that if Congress had intended to permit the Secretary to delegate to the Department of Justice his investigatory functions, then Congress would have specifically so stated. It is not for a court to modify the legislative scheme.

D. The Secretary of Labor Has Not in Fact Delegated His Investigative Authority to the Department of Justice.

To justify conducting this investigation, the Respondent cited three documents. First, he points to General Order No. 102, dated September 24, 1959 (45a-46a), which created within the Department of Labor a Bureau of Labor-

Management Reports, headed by a Commissioner. Second, he refers to a "Notice of Memorandum of Understanding between Departments of Justice and Labor" dated February 16, 1960 (47a), dividing responsibility for various investigations under the Landrum-Griffin Act. Third, he refers to a letter dated May 31, 1961 (48a) from the Commissioner of the Bureau of Labor-Management Reports to the Criminal Division of the Department of Justice, purportedly authorizing the specific investigation involved in this case.

However the Memorandum of Understanding does not delegate to the Department of Justice the right to investigate matters relating to the requirements of reporting under Title II of the Landrum-Griffin Act. In fact, that Memorandum specifically reserves to the Department of Labor the function of investigating matters arising under Title II. The Memorandum states:

> "Subject to specific arrangements agreed upon by the Department of Justice and the Department of Labor on a case by case basis, investigation under the Act will be conducted as follows:
>
> "(a) The Department of Labor will through its own staff investigate those criminal matters arising under:
>
> "1. Title II (Reporting by Labor organizations, officers, and employees of Labor organizations and employers).
>
> "• • •"

The District Court construed the Commissioner's letter (48a) to constitute a case by case arrangement contemplated by the Memorandum (75a-76a). However, it is clear that when the Memorandum speaks of arrangements on a case by case basis, it does not mean to authorize exceptions to the division of functions set out in the Memorandum, but rather relates to specific procedures, such as extent of co-

operation, in those investigations designated in the Memorandum. In other words, it does not authorize the Department of Justice in some cases to investigate criminal matters arising under Title II; those matters are specifically reserved by that Memorandum for the Department of Labor. It merely authorizes case by case cooperation. Any other interpretation would be outside of the statutory authority. Thus, the letter from the Commissioner, which was not published in the Federal Register nor in any way made public, is ineffective to convey to the Department of Justice power to investigate.

Furthermore, General Order No. 102, purporting to establish a Bureau of Labor-Management Reports, and to delegate functions to that Bureau, is ineffective if the statute does not authorize delegation by the Secretary of Labor. *But even if effective, that General Order does not authorize the Commissioner in turn to delegate his functions to any other agency.* The importance of the investigatory function makes it mandatory that a responsible official within the department exercise considered judgment in every case; it does not permit redelegation by subordinate officials to other departments. In passing upon a similar issue, Judge (now Circuit Judge) Ganey concluded that:

> "'. . . the vast power inherent in the process of subpoenas must be closely guarded. The decision as to when a subpoena duces tecum should issue should be the judgment of a responsible official, and in every instance should receive his considered judgment; further that responsible official should extend to no one more subordinate than a Regional Director or Acting Regional Director who is immediately responsible to the Administrator. To permit this power of redelegation by the Regional Director or Acting Regional Director to some one less subordinate would be to permit a large number of minor officials to issue subpoena duces tecum, which would permit the opportunity of converting them

into instruments of oppression. While it may be argued that Robert M. Anderson, the person who signed the subpoena and caused it to be issued, is a responsible attorney; that the documents called for in the subpoena are necessary and pertinent to the inquiry, yet it is the opportunity for the exercise of the power that is to be condemned, since in another instance if this redelegation of power by the Regional Director or Acting Regional Director is permitted may work oppression." *Fleming v. Easton Pub. Co.*, 38 F. Supp. 677, 680 (E. D. Pa. 1941).

Thus, the letter from the Commissioner (48a), purportedly redelegating to the Department of Justice a function delegated by the Secretary to the Commissioner, is *ultra vires*, goes beyond the authority of the Commissioner and violates the Act.

2. The Secretary Cannot Delegate His Duty of Issuing and Signing Subpoenas, and Has in Fact Not Done So.

A. The Secretary Cannot Delegate His Authority to Issue and Sign Subpoenas.

The subpoena is signed not by the Secretary of Labor, but by the Acting Commissioner of the Bureau of Labor-Management Reports (7a). It is respectfully submitted that the subpoena is accordingly a nullity.

The Secretary derives his power to issue subpoenas from § 601(b) of the Landrum-Griffin Act, which incorporates the provisions of sections 9 and 10 of the FTC Act, relating to attendance of witnesses and production of books, papers and documents. Section 9 spells out the subpoena power of the Commission—and specifically provides that only *members* of the Commission may sign subpoenas.

This Court and other appellate courts, in interpreting other statutes incorporating the provisions of the FTC Act, have held that the officials designated in such statutes can-

not delegate their function of signing and issuing subpoenas without express provision in such Acts. For example, see *Cudahy Packing Co. v. Holland*, 315 U. S. 357 (1942); *Cudahy Packing Co. v. Fleming*, 315 U. S. 785 (1942), *reversing* 122 F. 2d 1005 (8th Cir. 1941); *Lowell Sun Co. v. Fleming*, 120 F. 2d 213 (1st Cir. 1941), *affirmed*, 315 U. S. 784 (1942) (all three cases involving the Fair Labor Standards Act); and *NLRB v. Pesante*, 119 F. Supp. 444 (S. D. Calif. 1954) (involving the Taft-Hartley Act).

Even if we are to substitute "Secretary" for "member of the Commission" in the FTC Act, it is clear that section 9 does not by itself authorize the Secretary to delegate his duty, since there is no one else in his Department in a position analogous to member of the Commission. Therefore, if there is any delegation authorized it must be found specifically in the Landrum-Griffin Act.

The District Court concluded that the phrase "or any officers designated by him," contained in § 601(b), authorizes such delegation (72a-73a). As already noted, subsection 601(b) does not enlarge any of the powers granted to the Secretary in subsection 601(a) or any other section. The Secretary does not derive his subpoena power from the language of subsection 601(b); on the contrary, he derives the subpoena power from the Federal Trade Commission Act, which is engrafted onto the Landrum-Griffin Act by subsection 601(b). Thus, the Landrum-Griffin Act merely incorporates the scheme set out in the FTC Act. Even if a common sense interpretation requires substituting for the term "member of the commission" used in the FTC Act the word "Secretary," who occupies a similar position in the Department of Labor, the FTC Act cannot and does not expand the Secretary's right to delegate. And since § 601(b) does not itself define the rights or duties of the Secretary with respect to the subpoena power, the phrase "or any officers designated by him" cannot grant him a right to delegate not granted elsewhere in the Landrum-Griffin Act.

Even the apparently specific provision that "the duly authorized representative" of the Administrator of the Wage and Hour Division of the Department of Labor may exercise any or all of the powers in any place on behalf of the Administrator has been held by this Court not to authorize the Administrator to delegate his right to sign subpoenas. *Cudahy v. Holland, supra.* The Court noted that:

> "Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred. It is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer. Under the present Act, the subpoena may, as in this case, be used to compel production at a distant place of practically all of the books and records of a manufacturing business, covering considerable periods of time. True, there can be no penalty incurred for contempt before there is a judicial order of enforcement. But the subpoena is in form an official command, and even though improvidently issued it has some coercive tendency, either because of ignorance of their rights on the part of those whom it purports to command or their natural respect for what appears to be an official command, or because of their reluctance to test the subpoena's validity by litigation. All these are cogent reasons for inferring an intention of Congress not to give unrestricted authority to delegate the subpoena power which it has in terms granted only to the responsible head of the agency." *Cudahy Packing Co. v. Holland, supra,* 315 U. S. at 363-364.

If an apparently specific right of delegation is interpreted so narrowly, then *a fortiori* § 60[1](b) cannot be interpreted as granting the right to delegate this function.

In *Cudahy v. Holland, supra,* 315 U. S. at 364-366, notes 4-10, and *Lowell Sun Co. v. Fleming, supra,* 120 F. 2d at

216, notes 2-3, the Courts itemize and distinguish between instances in which Congress has seen fit specifically to authorize delegation of the subpoena power by heads of administrative agencies; this Court concluded that:

> "The entire history of the legislation controlling the use of subpoenas by administrative officers indicates a Congressional purpose not to authorize by implication the delegation of the subpoena power." *Cudahy v. Hollanyl, supra,* 315 U. S. at 364.

That conclusion is particularly appropriate here.

The *Cudahy v. Holland* case has never been overruled or limited. In *Fleming v. Mohawk Wrecking and Lumber Co.,* 331 U. S. 111 (1947), cited by Respondent in the Court below, this Court specifically reiterated the principles set forth in the *Cudahy v. Holland* case, but expressly distinguished it. It did so on four major premises; an analysis of these two cases shows that in each premise the case *sub judice* is controlled by the *Cudahy* decision, and distinguishable from the *Mohawk* decision:

> (1) The legislative history of the Fair Labor Standards Act, involved in the *Cudahy v. Holland* case, showed that a legislative committee considering the Act had specifically rejected a provision authorizing delegation; while the legislative history of the Emergency Price Control Act, relied upon in the *Mohawk* case, showed a legislative expression of intention to authorize such delegation. Here the legislative history is silent on such issue; in light of the many statutes specifically authorizing delegation, this certainly implies that Congress never even considered authorizing such delegation.
>
> (2) In the *Cudahy* case the Act made expressly delegable the power to gather data and make investigations, thus lending support to the view that when Congress desired to grant authorization to delegate it

said so explicitly; but there was no such specific delegation as to a particular function in the Act involved in the *Mohawk* case. Here, although the legislature did not specifically authorize delegation of any functions, it used phrases appropriate to delegation in § 601(b) and did specifically authorize cooperation with other agencies in § 607. If it intended to authorize delegation of the subpoena power, it could easily have said so.

(3) This Act, like the one involved in *Cudahy*, incorporates the subpoena power of the Federal Trade Commission Act. The Act in the *Mohawk* case, however, set forth the subpoena power without regard to any other Act, having a history of its own.

(4) This Act, like that involved in the *Cudahy* case, granted no broad rule-making power. The Act in the *Mohawk* case did grant such power, and the Court concluded that such power itself might be adequate source of authorization to delegate a particular function. 331 U. S. at 121; *cf. NLRB v. Pesante, supra*, 119 F. Supp. at 454-455.

It is interesting to note that Justice Jackson, concurring in the *Mohawk* case, drew attention to the fact that the very nature of the Emergency Price Control Act necessitated issuance of many subpoenas throughout the country, most of which would not be contested. He noted that the personal signature of the Administrator on such subpoenas would be no protection to individual rights, since he might sign them in blank or sign batches prepared by subordinates without investigating the underlying facts. However, he recognized that enforcement of those subpoenas is not and should not be automatic and noted that adequate judicial safeguards existed for the protection of fundamental rights. In the Act under consideration here, there is no necessity for wholesale issuance of subpoenas. On the contrary, by the very nature of the investigations contemplated in the

Landrum-Griffin Act, each should be the personal responsibility of the Secretary of Labor; and subpoenas should be issued only when he is personally convinced of their necessity. This duty should not be turned over to a subordinate, even if he is a responsible and high-placed one. See *NLRB v. Pesante, supra,* 119 F. Supp. at 454.

Furthermore, one other point of distinction between *Cudahy* and *Mohawk* should be noted, as to which the case at bar is closely similar to *Cudahy*. In *Cudahy*, as in the case at bar, the issuance of the subpoenas was discretionary; while in *Mohawk* the issuance was a ministerial act. The Court need not be greatly concerned with the protection of individual rights where the head of the administrative agency himself has no discretion to refuse to issue the subpoena when properly requested. On the other hand, this factor assumes great importance where the administrative head has such discretion, and where, in the language of this Court, the subpoena power "is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer." *Cudahy Packing Co. v. Holland, supra,* 315 U. S. at 363.

The cases cited by Respondent in the courts below do not stand for broad principles of delegation of the subpoena power. In *NLRB v. Barnes*, 178 F. 2d 156 (7th Cir. 1949), the court merely authorized issuance of blank subpoenas bearing the printed seal of the National Labor Relations Board and the signature of a member of the National Labor Relations Board. That court explicitly distinguished *Cudahy v. Holland* on the grounds that *Cudahy* involved a discretionary, not a ministerial act. Here, the issuance is likewise discretionary. It also distinguished *Cudahy* on the grounds that the latter involved signing as well as issuing, both of which are involved here.

In *NLRB v. Lewis*, 349 F. 2d 832 (9th Cir. 1952), the Court authorized the issuance of subpoenas by a Regional Director over the seal of the National Labor Relations

Board and the facsimile signature of a member of the Board. The Court explicitly distinguished the *Cudahy* and *Mohawk* cases as involving different statutes. *Fleming v. Brown*, 162 F. 2d 409 (3rd Cir. 1947), also cited by Appellee, is completely inapposite. In a four-sentence opinion, the Court, citing the *Mohawk* case, merely refused to abate or dismiss as moot an appeal from an order refusing to compel obedience to a subpoena *duces tecum*.

Accordingly, it is respectfully submitted that the authoritative cases forbid delegation of the power to issue and sign subpoenas, such as relied on here.

B. The Subpoena Power Has Not in Fact Been Delegated.

A careful reading of General Order 102 (45a) shows that the Secretary of Labor has not in fact delegated to the Commissioner of the Bureau of Labor-Management Reports the power to issue and sign subpoenas. This General Order permits him to "issue *orders* to compel the attendance and testimony of witnesses and the production of documents." (Emphasis supplied.) Certainly if the Secretary meant to delegate the right, which Appellee claims was given to him by section 9 of the FTC Act, to issue and sign subpoenas, this General Order would have used the word "subpoena," as used in that Act, not "order." On the other hand, if, as contended by Petitioner, this power cannot be delegated, then the General Order could be interpreted to mean that the Commissioner has the right to issue "orders" which, if not voluntarily complied with by witnesses, might be the basis of a request for the issuance of a subpoena by the Secretary himself. This construction would save the General Order from being invalid for delegating a non-delegable function.

The administrative practice, although not controlling, seems to recognize the complete lack of the Commissioner's power to issue subpoenas. As specifically pointed out by Petitioner at the proceeding before Mr. McBride (24a-25a), the very form of subpoena demonstrates that in almost two years of activities under the Act no subpoena forms have

been printed by the Commissioner. If General Order 102, dated September 24, 1959 granted the power claimed by Appellee, then it is manifest that even governmental red-tape would not have prevented the Commissioner from printing appropriate subpoenas by this time.

Accordingly, it appears that until this proceeding not even the Commissioner believed he had the right to sign and issue subpoenas in aid of such an investigation—and, it is respectfully submitted, he has no such right.

3. An Individual Who Has No Duties Under the Landrum-Griffin Act Cannot Be Compelled to Appear and Testify in a Proceeding Such as Involved Here.

Neither the Petition (2a-5a) nor the subpoena (7a) set forth an allegation that Petitioner is a person subject to the Landrum-Griffin Act or has any duties thereunder,[4] nor did they aver any reasonable basis for believing that there had been or would be any violation of the Landrum-Griffin Act. The allegations made during the course of the proceedings, before Mr. McBride, that Petitioner is a labor relations consultant, that many years ago he was associated with a union and in that association had some contact with Louis Lanni, that he and one of his employers were believed to have attended a banquet held by the Teamsters League of Philadelphia and Vicinity, are all irrelevant in determining whether there is a reasonable basis for believing that there has been or is about to be any violation of the Act.

Thus, there is no claim that Petitioner's testimony is sought because of any duty he owes under the Act or be-

4. Nor were labor relations consultants even referred to by that title in the Taft-Hartley Act as originally enacted, they were given no duties and they were subjected to no specific prohibitions. It was not until the Landrum-Griffin Amendment to the Taft-Hartley Act in 1959 that the transaction alleged by Mr. McBride even came within the Taft-Hartley Act. 29 U. S. C. § 186, as amended, 73 Stat. 537. But, as already noted, the proceeding in the case at bar did not purport to relate to violation of the Taft-Hartley Act or the Landrum-Griffin Amendments to the Taft-Hartley Act. See page 5, *supra* at note 3.

cause it is believed that he has violated or is about to violate the Act; he was subpoenaed solely because he might have some information concerning a transaction which someone else might—or might not—be required to report under the Act.

Section 601(a) requires that the Secretary, in order to make an investigation, must *believe it to be necessary.* This implies that the Secretary cannot indiscriminately initiate investigations and issue subpoenas. There must be some showing that such an investigation is believed necessary—that is, some showing of "probable cause" or "reasonable grounds to believe" that the information is necessary. But compare *Truck Drivers Local Union No. 299 v. Goldberg*, 293 F. 2d 807 (6th Cir. 1961), *cert. denied*, 368 U. S. 938 (1961). In the case at bar not only is there no averment of any grounds to believe the testimony is necessary, but there is not even the semblance of claim that the investigation comes within the scope of the Landrum-Griffin Act—as was at least implicit in the *Truck Drivers Local* case, *supra.*

In the case at bar, the District Court concluded that the language of the Act is clear and unlimited, and empowers the Secretary to question *any person* he may deem necessary to enable him to determine the facts relative to the violation; therefore, it applies to persons not themselves subject to the Act. However, the Court did not make any finding that the Secretary deemed this investigation necessary, or that he did so properly, with reasonable grounds. To adopt the District Court's unlimited construction would be to permit administrative officials to visit any individual in the United States, at any time, to question him or to examine his books and records, or to subpoena him to appear at a secret administrative proceeding, and to quiz him about all he might know or might have observed. In other words, the most atrocious type of fishing expeditions would be authorized, and no individual would be safe—since at some time every individual might have seen an

employer or an employee or an agent of either engage in some transaction which could come within the reporting provisions of the Landrum-Griffin Act. Even Mr. McBride's statement as to the intended scope of his examination disclosed how far afield he intended to go:

> "I want to go into collateral matters in connection with dealing with Mr. Lanni or any other union official." (21a).

This is even further afield than feared by Justice Black concurring in *United States v. Minker*, *supra*, 350 U. S. at 195-196.

In *General Tobacco and Grocery Co. v. Fleming*, 135 F. 2d 596 (6th Cir. 1942), the court rejected the contention that a statute equally as broad as the Landrum Griffin Act, the Fair Labor Standards Act, authorized the Administrator of the Wage and Hour Division to require an employer by subpoena duces tecum to produce books and records without an allegation and proof that the employer was subject to the Act. The court rejected the Administrator's contention that he had been "accorded visitorial and inquisitorial power over all industry, to determine whether any person has violated any provision of the Act, or for the purpose of aiding the enforcement of the provisions of the Act." 125 F. 2d at 599. The court stated:

> "To adopt this strained construction would extend the sweep of his inquisitorial power beyond the apparent intention of Congress as evidenced by the repeated limitations of the applicability of the Act to those subject to its provisions. An administrator must restrain himself within the bounds of his delegated authority. It is unreasonable to assume that Congress intended that one who, when called upon to produce his books and records, denies that he is engaged in transactions within the purview of the Act should be refused a hearing upon that issue before his privacy is invaded in

derogation of his individual immunity from unreasonable search of his papers and effects.

> "In the exercise of the judicial power to review questions of law, as conferred by an Act of Congress, the seal of a United States Court should not become a mere rubber stamp for the approval of arbitrary action by an administrative agency. Why, in the context, should any power of review whatever have been vested in the courts unless Congress intended that such review should be judicially exercised?" 125 F. 2d at 599.

It must be equally noted that the seal of the Department of Labor should not become a rubber stamp for the inquisitorial whims of every one of the subordinate officials in the department, or for the desires of members of another agency. Likewise, Congress must have intended some limitation on the power of the Secretary to initiate investigations; it must have intended him to exercise some discretion in determining whether the investigation is necessary—and it must have intended the courts to review that discretion.

To permit sweeping inquisitions of all individuals, whether or not subject to the Act, without judicial control or sanction, without a showing of reasonable necessity, and without even the personal supervision by the head of the administrative agency responsible for the investigation, would be to countenance tactics unknown outside of a police state.

The power of administrative officials to subpoena witnesses under a statute granting very broad subpoena powers was considered by this Court and limited in *United States v. Minker, supra.* The Court there found the word "witness" to be patently ambiguous as used in the Act, and that it did not embrace individuals who might themselves be subject to denaturalization proceedings. The Court, citing the *Cudahy v. Holland* case, *supra*, made specific note of the potentially oppressive use of administrative subpoenas. 350 U. S. at 187. In the case at bar, an even

broader subpoena power is sought on behalf of an administrative official, and is capable of oppressive use if interpreted as broadly as contended by Respondent.

Accordingly, it is respectfully submitted that Petitioner was not properly subject to the inquiry initiated here, and that there could be no such inquiry without a showing of some reasonable basis to believe that an investigation was necessary and that Petitioner's testimony was necessary for that investigation.

4. Petitioner's Constitutional Rights Would Be Impaired if He Were to Comply With the Purported Subpoena; the Immunity Granted Is Not Broad Enough to Comply With Constitutional Requirements.

Petitioner did not contumaciously refuse to comply with the subpoena issued in this matter. He refused to be sworn and to testify out of fear that his constitutional rights would be irreparably harmed.

Section 9 of the FTC Act, incorporated by § 601(b), provides immunity from prosecution, forfeiture or penalty for witnesses in return for their compulsory testimony. However, to be entitled to immunity under that Act, such witness must appear before the Secretary (who occupies the position comparable to the Commission under the FTC Act) in obedience to the subpoena of the Secretary (Commission under the FTC Act). Thus, if the Secretary has no statutory authority to delegate to the Department of Justice the right to conduct this investigation, or has not in fact done so, then the witness is not appearing before the proper party and would thus not be entitled to immunity. Likewise, if the Secretary has not the statutory right to delegate to the Commissioner the right to issue and sign subpoenas, or has not in fact done so, then the witness is not appearing in obedience to a subpoena of the Secretary, and is not entitled to immunity. See *Sherwin v. United States*, 268 U. S. 369 (1925); *Goodman v. United States*, 273 F. 2d 853 (8th Cir. 1960). (It is true, as noted by the

District Court, that in these two cases no subpoenas had been issued (77a). However, testimony under an invalid subpoena or in an invalid proceeding can confer no greater right to immunity than was conferred in those two cases.)

Furthermore, the immunity offered in exchange for testimony here is not sufficient to displace the constitutional protections. This Court almost seventy years ago struck down a statute compelling testimony where the statute did not grant immunity from prosecution based on knowledge and sources of information obtained from the compelled testimony. *Counselman v. Hitchcock*, 142 U. S. 547 (1892). It has since upheld statutes where the immunity was complete, as in *Adams v. Maryland*, 347 U. S. 179 (1954), where the statute compelling testimony in congressional investigations prohibited the use of such testimony in *any* court, and in *Ullman v. United States*, 350 U. S. 422 (1956), where the Court concluded that immunity had been granted from state as well as federal prosecution, since the Act was concerned with national security. The federal government has preempted the field of national security legislation. *Compare Commonwealth v. Nelson*, 350 U. S. 497 (1956), *with Uphaus v. Wyman*, 360 U. S. 72 (1959).

Here, however, Congress has not preempted the field of labor legislation. Conduct which might constitute a violation of federal labor law might also constitute violation of state labor laws. Accordingly, the immunity provision of the FTC Act, adopted by the Landrum-Griffin Act, cannot prevent state prosecution as in the *Ullman* case. Accordingly, the privilege is not sufficiently broad to meet the requirements of the Constitution.

United States v. Murdock, 284 U. S. 141 (1931), cited by the District Court (77a), is not in point since it did not involve testimony compelled under a statute such as involved in the case at bar. In that case defendant was prosecuted for wilfully failing to supply information to an internal revenue official authorized to seek such information. The Court concluded that he could not justify re-

fusal to answer on the sole ground that he feared he might incriminate himself of a state offense. Only a federal inquiry was there involved. This is quite different from the question of whether a witness can be compelled to testify under a statute offering immunity from prosecution where the subject matter is within the realm of both federal and state legislation. Under such circumstances the statute does not meet the test set down in *Counselman v. Hitchcock, supra.*

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the paper entitled a "subpoena" served on the Petitioner is invalid and a nullity; that the Department of Justice had no right to conduct this investigation and to attempt to use the subpoena power of the Department of Labor in aid thereof; that the Secretary of Labor has no statutory authority to delegate his power to investigate for suspected labor violations, and that he has not in fact delegated that power to the Department of Justice; that he has no power to delegate the task of signing and issuing subpoenas, and that he has not in fact done so. Furthermore, the statute as applied to Petitioner violates his constitutional rights guaranteed by the Fifth Amendment. Therefore, the relief sought by the Respondent should have been denied, and the subpoena should have been ordered quashed.

These issues affect not only the important federal rights of Petitioner, but the entire enforcement of the federal Act. This Court should accordingly grant a writ of certiorari.

Respectfully submitted,

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Philadelphia 2, Pennsylvania,
Attorney for Petitioner.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,776

ARTHUR J. GOLDBERG, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

v.

THOMAS BATTLES,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued March 8, 1962

Before STALEY, HASTIE and SMITH, *Circuit Judges*

OPINION OF THE COURT

(Filed March 19, 1962)

PER CURIAM.

The district court ordered enforcement of a subpoena issued by the Acting Commissioner, Bureau of Labor-Management Reports, United States Department of Labor, directing appellant to appear and testify before an official of the Justice Department conducting an investigation for the Department of Labor. We think the order correct and affirm based on the able opinion of Judge Clary below, reported at 196 F. Supp. 749 (E.D.Pa., 1961).

The order of the district court will be affirmed.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,776

ARTHUR J. GOLDBERG, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

v.

THOMAS BATTLES,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: STALEY, HASTIE and SMITH, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of August 23, 1961 of the said District Court in this case be, and the same is hereby affirmed.

Attest:
IDA O. CRESKOFF
Clerk

March 19, 1962